Hospital of Barstow, Inc. d/b/a Barstow Community Hospital and California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), AFL–CIO. Cases 31–CA–090049 and 31–CA–096140

July 15, 2016

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On August 29, 2014, the National Labor Relations Board issued a Decision and Order in this proceeding, reported at 361 NLRB No. 34, in which it adopted the findings of Administrative Law Judge Jay R. Pollack that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to submit any bargaining proposals or counterproposals until it received the Union's entire contract proposal, and by declaring impasse and refusing to bargain unless the Union directed unit employees to stop using the union-provided Assignment Despite Objection (ADO) form to document circumstances that they believed were unsafe for patients or could jeopardize their nursing licenses. Id. at 1. The Board also found that "[t]he Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its HeartCode policy to replace onsite, instructor-led training with the online training program, and by limiting the number of hours that employees could be paid for completing the program." Id. at 3. Finally, the Board rejected the Respondent's claim, raised for the first time in the unfair labor practice case, that the Regional Director lacked authority to certify the Union in Case 31–RC–080046 because the certification issued at a time when the Board lacked a quorum. The Board did not address the merits of the Respondent's quorum-based argument, finding that the Respondent waived its right to challenge the certification when it entered into negotiations with the Union. Id. at 1, fn. 5.

Subsequently, the Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review, and the Board filed a cross-application for enforcement. In support of its petition for review, the Respondent argued, inter alia, that the Board erred in finding that the Respondent waived its quorum-based challenge to the authority of the Regional Director to certify the Union as the collective-bargaining representative of a unit of the Respondent's employees. The essence of the Respondent's argument, as refined during oral argument before the court, centered on its interpretation of the court's recent decisions in *SSC Mystic Operating Co. v. NLRB,* 801 F.3d 302 (D.C. Cir. 2015); and *UC Health v. NLRB*, 803 F.3d 669 (D.C. Cir. 2015). In a November 15, 2015 letter to the court, the Respondent stated:

> The Hospital's position in response to the Board's citations to supplemental authorities was clearly articulated during oral argument – namely, the Hospital argues that this Court's holdings in *UC Health* and *SS Mystic* [sic] clearly hold: (1) that the Hospital has not waived its argument concerning the validity of the Union's certification, given its underlying challenge to the composition of the Board, which cannot be waived; and (2) that the Board's delegation of "final, plenary authority" to the Board's Regional Directors via Consent Election Agreements, when the Board itself lacked quorum, violated the National Labor Relations Act. (Citations omitted.)

On April 29, 2016, the D.C. Circuit granted the Respondent's petition for review, finding that the Respondent did not waive its argument that the Regional Director lacked delegated authority to certify the Union during a time when the Board lacked a quorum. *Hospital of Barstow, Inc. v. NLRB*, 820 F.3d 440, 442–443 (D.C. Cir. 2016) (citing *UC Health*, 803 F.3d at 671–75; and *SSC Mystic*, 801 F.3d at 308). With regard to the merits of the Respondent's quorum-based argument, however, the court found that its decisions in *UC Health* and *SSC Mystic* were not dispositive. Id. at 443–444. The court reasoned that *UC Health* and *SSC Mystic* each involved a stipulated election agreement where the Regional Director's actions were subject to Board review, whereas this case involves a consent election agreement where "the parties agree that the Regional Director's actions in connection with the election will be final and unreviewable by the Board." Id. at 444 (citation omitted). Because the Board had not yet addressed the merits of the Respondent's quorum-based argument in the context of a consent election agreement, the court vacated the Board's decision and remanded the case "to enable the Board to render an interpretation as to whether, under the quorum statute, Regional Directors retained power over representation elections notwithstanding the lapse of a Board quorum in the circumstances presented by this case." Id. at 441.

By letter dated June 6, 2016, the NLRB Office of the Executive Secretary advised the parties that the Board

has decided to accept the remand.[1] The Executive Secretary further advised the parties that any statements of position with respect to the issues raised by the remand must be received by the Board on or before June 20, 2016. Thereafter, the Charging Party and the Respondent each filed a statement of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We accept as the law of the case the court's finding that the Respondent did not waive its argument that the Regional Director lacked delegated authority to certify the Union during a time when the Board lacked a quorum. Accordingly, we consider below the merits of the Respondent's quorum-based challenge to the authority of the Regional Director in this matter.

The Board's delegation of its decisional authority in representation cases to regional directors dates back to 1961, and is expressly authorized by the Labor-Management Reporting and Disclosure Act of 1959, which amended Section 3(b) of the National Labor Relations Act to include the following language:

> The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filling of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

Pub. L. 86-257, 86th Cong., 1st Sess., § 701(b), 73 Stat. 519, 542; see *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971) (by Section 3(b) Congress allowed the Board to make a delegation of its authority over representation elections to the regional director).

This new authority was "'designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its Regional Directors for final determination.'" *Magnesium Casting Co.*, 401 U.S. at 141 (quoting Sen. Goldwater, a Conference Committee member); see 105 Cong. Rec. 19,770 (1959) (statement of Sen. Goldwater that the new provision would enable the Board to give Regional Directors the power "to act in all respects as the Board would act," subject to discretionary Board review). Acting on that authority, the Board in 1961 delegated decisional authority in representation cases to regional directors. See 26 Fed. Reg. 3911 (May 4, 1961). The Board also promulgated rules implementing that delegation. See 29 C.F.R. Part 102, Subparts C, D and E; *Magnesium Casting*, 401 U.S. at 138.[2] The 1961 delegation and the Board's implementing rules have remained in effect without interruption for more than half a century, and regional directors have routinely exercised their delegated authority in accordance with those rules throughout the intervening decades, including during those periods when the Board itself lacked a quorum.[3]

Subpart X of the Board's Rules and Regulations establishes policies and procedures applicable during any period when the Board lacks a quorum. That subpart begins with the following general statement of policy:

> The policy of the National Labor Relations Board is that during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law.

Sec. 102.178 of the Board's Rules and Regulations. With regard to the processing of representation cases when the Board lacks a quorum, Section 102.182 states that representation cases should be processed to certification "[t]o the extent practicable". Thus, consistent with Section 3(b) of the Act, the 1961 Delegation, and the Board's Rules and Regulations, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment. See *SSC Mystic Operating Co., LLC d/b/a Pendleton Health*

[1] On June 1, 2016, the parties filed a Joint Motion for Issuance of Expedited Mandate asking the Court to "return the proceedings to the agency, so that the Board may promptly reassume jurisdiction over the proceedings." The mandate issued on June 8, 2016.

[2] Shortly after the 1961 delegation, the Board described it as "a new procedural step—and one of the most important in Board history." 26th Annual Report of the NLRB, at 1 (1961). "The significance of this delegation was confirmed when the regional directors disposed of the first 52 cases in an average of 34 days from filing to direction of election," when cases in the prior 6 months had averaged 113 days. Id. at 2.

[3] The delegation provides, in relevant part:

> Pursuant to section 3(b) of the National Labor Relations Act, as amended, and subject to the amendments to the Board's Statements of Procedure, Series 8, and to its Rules and Regulations, Series 8, effective May 15, 1961, and subject to such further amendments and instructions as may be issued by the Board from time to time, the Board delegates to its Regional Directors "its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof." Such delegation shall be effective with respect to any petition filed under subsection (c) or (e) of section 9 of the Act on May 15, 1961.

This delegation occurred when the Board had a quorum and has never been withdrawn.

& Rehab. Ctr., 360 NLRB No. 68, slip op. at 1, fn. 1 (2014), enfd. 801 F.3d 302 (D.C. Cir. 2015); *UC Health*, 360 NLRB No. 71, slip op. at 1, fn. 2 (2014), enfd. 803 F.3d 669 (D.C. Cir. 2015); and *Bluefield Hospital Co., LLC, d/b/a Bluefield Regional Medical Ctr.* 361 NLRB No. 154, slip op. at 2, fn. 5 (2014), enfd. --- F.3d ---, 2016 WL 2609605 (4th Cir. 2016). See also *Manor at St. Luke Village Facility Operations, LLC d/b/a The Manor at St. Luke Village*, 361 NLRB No. 99, slip op. at 2 (2014); *Durham School Services, LP*, 361 NLRB No. 66, slip op. at 1 (2014).

In the context of stipulated election agreements, the D.C. Circuit Court of Appeals found the foregoing analysis to be "a sensible interpretation that is in no way contrary to the text, structure, or purpose of the statute." *UC Health*, 803 F.3d at 675; see also *SSC Mystic Operating Co.,* 801 F.3d at 309 ("The Regional Director had authority to conduct this election even though the Board had no quorum.") (citing *UC Health*, 803 F.3d at 673–79). Moreover, even where a regional director's decision becomes final because no party objects, the D.C. Circuit found no basis for concern—"In that event, it is the parties' choice to leave the Regional Director's decisions unchallenged that effectively makes the election final." *UC Health*, 803 F.3d at 680. The question presented in this case is whether the parties' "choice to leave the Regional Director's decisions unchallenged" is any less valid when it is manifested through a consent election agreement, in which the parties agree that the Regional Director's decisions will be final. See, Section 102.62(a) of the Board's Rules and Regulations.

As noted above, under the 1961 Delegation, NLRB Regional Directors have full authority to process representation cases, conduct representation elections, and certify the results thereof, subject to the Board's authority to "review any action of a regional director" at the objection of an interested person. See Section 3(b) of the NLRA, 29 USC § 153(b). Thus, the Board has not delegated its "final, plenary authority" to its regional directors. Board review, however, is not required in every case—the parties may, at any time, waive their right to request review, and in the absence of a request for review, the regional director's actions become final. See, e.g., Section 102.67(g) of the Board's Rules and Regulations.

The Board also makes available to the parties three types of informal consent procedures through which representation issues may be resolved without recourse to formal procedures. See Statement of the General Course of Proceedings Under Section 9(c) of the Act, 79 F.R. 74469, 74471–72 (Dec. 15, 2014); Section 102.62(a)–(c) of the Board's Rules and Regulations. These procedures are purely voluntary. One such procedure is a consent election agreement, in which the parties agree to waive their right to a pre-election hearing, agree to an election among a defined unit of employees, and agree that the regional director's determination of post-election disputes will be final. Section 102.62 (a) of the Board's Rules and Regulations. Thus, it is the parties' agreement, not the Board's delegation, that gives the Regional Director's decision finality.[4] Stated another way, the distinguishing characteristic of a consent election agreement is the parties' express agreement to forgo Board review and allow the Regional Director's decisions to be final. We do not see a meaningful distinction between the "finality" accorded to the Regional Director's certification of representative based on the parties' consent election agreement and the "finality" accorded to the Regional Director's certification of representative in *UC Health* based on the parties' choice not to seek Board review to which they otherwise were entitled under their stipulated election agreement.[5] Indeed, given the parties' unequivocal choice to proceed promptly to an election and allow the Regional Director to resolve post-election issues without direct Board review, we would find it particularly anomalous to nullify the parties' choice solely because, due to a lack of quorum, there was no Board empowered to consider a request for review that the parties had consciously and expressly chosen to forgo.

To conclude, in the underlying representation proceeding in this case, the Respondent and the Union made a conscious choice to enter into a consent election agreement through which they obtained certain benefits, including a prompt election and expeditious resolution of any post-election issues. In so doing, they chose to forgo their right to seek direct Board review of the Regional Director's actions, to which they otherwise were entitled, and to allow the Regional Director's decision in the representation case to be final. In this regard, we find the following analysis of the court in *UC Health*, supra, to be particularly instructive:

> In what turns out to be a critical distinction for the purposes of this challenge, the statute preserves for the Board the power to review "any action of a regional director" taken pursuant to that delegation, should a party

[4] As the court noted regarding a stipulated election agreement in *UC Health*, supra, "No decision of the Regional Director's is ever final under its own power. Only the acquiescence of the parties or the Board's ratification can give binding force to a Regional Director's determination." 803 F.3d at 680. Similarly, in a consent election agreement it is the "acquiescence of the parties" that gives binding force to the Regional Director's determination.

[5] *UC Health*, 803 F.3d at 680 ("[I]t is the parties' choice to leave the Regional Director's decisions unchallenged that effectively makes the election final.").

> object. 29 U.S.C. § 153(b). Thus, though the Board may empower Regional Directors to oversee representation elections, the terms of the delegation authorized under the Act provide that no Regional Director's actions are ever final on their own; they only become final if the parties decide not to seek Board review or if the Board leaves those actions undisturbed. Id.

UC Health, 803 F.3d at 671 (emphasis added).[6]

Simply stated, the Board has not delegated "final, plenary authority" to its regional directors. As noted above, it is the parties' agreement, not the Board's delegation, which gives a regional director's decisions finality in the context of a consent election agreement.[7]

Furthermore, notwithstanding the parties' consent election agreement to allow the regional director's decisions to be final, the Board may consider a challenge to the validity of the regional director's certification in a subsequent related unfair labor practice proceeding[8] if there is a showing of fraud, misconduct, or such gross mistakes as to imply bad faith or that the regional director's rulings were arbitrary or capricious.[9]

In view of the court's determination that the Respondent did not waive its right to challenge the certification when it entered into negotiations with the Union, which we have accepted as the law of the case, we have reviewed the underlying representation proceeding under the standards described above. The Respondent does not allege, nor do we find, any evidence of fraud, misconduct, or such gross mistakes as to imply bad faith or that the Regional Director's rulings were arbitrary or capricious. Accordingly, we reject the Respondent's challenge to the validity of the certification in Case 31–RC–080046.

Based on the foregoing interpretation of the Act and the Board's 1961 delegation of authority, we find that the Regional Director retained the authority to process the underlying representation proceeding, and to issue a certification pursuant to the parties' consent election agreement, notwithstanding the lapse of a Board quorum. Moreover, in view of the law of the case that Respondent did not waive its right to challenge the Regional Director's certification in this unfair labor practice proceeding, which the Respondent raised only after entering into negotiations with the Union, we have reviewed the underlying representation proceeding under the standards described above. As previously noted, we have found no basis to disturb the rulings of the Regional Director in the representation case.

Having found that the Regional Director was authorized to process the underlying representation proceeding, and having rejected the Respondent's challenge to the validity of the certification in Case 31–RC–080046, we turn to the merits of the instant unfair labor practice cases.

As noted above, in its April 29, 2016 decision in this matter, the Court of Appeals vacated the Board's decision and remanded the case "to enable the Board to render an interpretation as to whether, under the quorum statute, Regional Directors retained power over representation elections notwithstanding the lapse of a Board quorum in the circumstances presented by this case." *Hospital of Barstow, Inc.*, 820 F.3d at 441. In doing so, the court did not reach the merits of the Board's unfair labor practice findings and remedy in the Decision and Order in this proceeding, reported at 361 NLRB No. 34 (2014). Id. at 442. Accordingly, we have considered the judge's decision regarding the unfair labor practice issues and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the majority rationale set forth therein regarding the unfair labor practice findings. Based on our review of the record in this matter, we adopt and reissue the Board's Decision and Order report-

[6] The United States Court of Appeals for the Fourth Circuit reached a similar conclusion in *NLRB v. Bluefield Hospital Co.*, 2016 WL 2609605 at *4 (May 6, 2016). Pursuant to the D.C. Circuit's remand, we have provided a fuller explanation for that result in this case.

[7] Accordingly, contrary to Respondent's argument to the Court, this case does not involve any Board delegation of final authority like that considered in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009).

[8] In order to challenge a certification of representative, an employer must avail itself of the well-established test-of-certification procedures by refusing to recognize or bargain with the union and defending against the resulting unfair labor practice complaint by asserting an affirmative defense that the decisions of the Board (or Regional Director) in the representation proceeding were improper. See *NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (refusal to bargain "sets up judicial review of an election certification that is otherwise insulated from direct review").

[9] See e.g. *Economics Laboratory, Inc.*, 286 NLRB No. 66 (1987), enf. denied on other grounds, 857 F.2d 931, 938 (3d Cir. 1988); *Area E-7 Hospital Association*, 233 NLRB 798 (1977); *The Pierre Apartments*, 217 NLRB 445, 446 (1975); *Vanella Buick Opel, Inc.*, 196 NLRB 215 (1972) and cases cited therein.

This standard, which the Board has long applied in consent elections, should be distinguished from the standard applied in directed elections or elections conducted pursuant to a stipulation for certification upon consent election, where Board review is available to the parties in the representation case. Section 102.67(g) of the Board's Rules and Regulations generally precludes re-litigation of any representation issue that was or could have been presented in the underlying representation proceeding. However, this rule is not absolute even in directed or stipulated elections. If a Respondent offers to adduce newly discovered or previously unavailable evidence, or alleges other special circumstances, the Board may reexamine the decision made in the representation proceeding. See, e.g. *Capay, Inc. d/b/a Farm Fresh to You*, 363 NLRB No. 142, slip op. at 1 (2016), citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

ed at 361 NLRB No. 34, which is incorporated herein by reference.[10]

Dated, Washington, D.C. July 15, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[10] In its brief in support of its exceptions to the judge's decision, the Respondent argued that the complaint was not valid because Acting General Counsel Solomon was not lawfully appointed under Section 3(d) of the Act. The original Board decision rejected this argument for the reasons stated in *The Ardit Co*., 360 NLRB No. 15 (2013). 361 NLRB No. 34, slip op. at 1, fn. 4. Thereafter, the D.C. Circuit issued its opinion in *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), cert. granted, __ U.S.L.W. ____ (U.S. June 20, 2016), holding that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. Although the Respondent has not raised this FVRA argument before the Board, on June 29, 2016, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification, which states, in relevant part,

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
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> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

This ratification effectively moots any possible FVRA challenge in this matter. See, e.g. *Bloomindale's, Inc.*, 363 NLRB No. 172 (2016).